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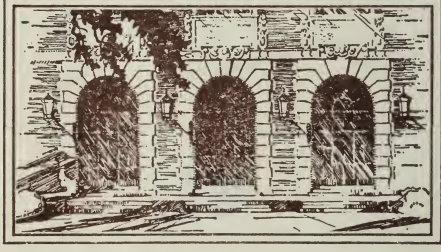

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A MANUAL

OF

THE LAW

OF

REAL ESTATE BROKERS.

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BY

WILLIAM R. LYNCH,

OF THE NEW YORK BAR.

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NOTE.

THE following pages were outlined some years ago for the use of a client. At his suggestion they are now, with much diffidence, offered to the public in the present convenient form. The aim of the writer has been no more pretentious than to furnish the broker with practical information regarding his rights and duties, and to present to his brethern of the bar the latest adjudications of the courts of this state upon the subject considered.

W. R. L.

No. 10 WALL ST., N. Y.
February, 1876.

CONTENTS.

		PAGE
NOTE		iii
AUTHORITIES		vii
CHAPTER I.	Definitions	1
" II.	Authority of Broker	4
" III.	Ratification	12
" IV.	Duty of Broker	15
" V.	Liability of Broker	25
" VI.	Liability of Principal	39
" VII.	Commissions	42
" VIII.	The Contract of Sale	58
" IX.	Record of Contract and Notice	69
" X.	Relation of Vendor and Purchaser	75
" XI.	Interest and Usury	78
APPENDIX:		
I.	Of the Interest of Money	85
II.	Act to prevent Usury	90
III.	Forms	94
INDEX		101

AUTHORITIES.

A.

Algur v. Gardner, 54 N. Y. 360.

B.

Bacon's Abridgment.
Bank of U. S. v. Waggener, 9 Peters, 399.
v. Davis, 2 Hill, 451.
Bain v. Brown, 56 N. Y. 285.
Barnard v. Monnot, 33 How. Pr. 440 ; 1 Ab Ct. Ap. 110.
Barnes v. Roberts, 5 Bosw. 73.
Bell v. Day, 32 N. Y. 168.
Bennet v. Judson, 21 N. Y. 238.
Blood v. Goodrich, 12 Wend. 525.
Bouvier's Law Dictionary.
Bridenbecker v. Lowell, 32 Barb. 9.
Broad v. Hoffman, 6 Barb. 177.
Brockway v. Allen, 17 Wend. 40.

C.

Canal Appraisers v. The People, 17 Wend. 571.
Cassard v. Hinman, 6 Bosw. 8.

Champlin v. Parish, 11 Paige, 405.
Charter v. Trevelyn, 11 Clark & Fin. 714.
Chilton v. Butler, 1 E. D. Sm. 150.
Clarke v. Meigs, 10 Bosw. 337.
Clark v. Metropolitan Bank, 3 Duer, 241.
Clinton v. Hope Ins. Co. 45 N. Y. 454.
Coleman v. Garrigues, 18 Barb. 60.
Colton v. Dunham, 2 Paige, 267.
Cogger v. Lansing, 43 N. Y. 550.
Colvin v. Holbrook, 2 N. Y. 126.
Condit v. Baldwin, 21 N. Y. 219.
Conkey v. Bond, 36 N. Y. 427.
Cook v. Phillips, 56 N. Y. 310.
Corning v. Calvert, 2 Hilt. 56.
Corp v. Brown, 2 Sand. 293.
Craig v. Ward, 3 Keyes, 387.

D.

Deebeerski v. Paige, 47 Barb. 172; 36 N. Y. 539.
Denny v. Manhattan Co. 2 Den. 115.
Dobson v. Racey, 3 Sand. Ch. 60.
Doty v. Miller, 43 Barb. 529.
Dung v. Parker, 52 N. Y. 495.
Dunham v. Williams, 37 N. Y. 251.
Dunlop v. Richards, 2 E. D. Sm. 181.
Dutton v. Willner, 52 N. Y. 312.
Dusenbury v. Ellis, 3 Johns. Cases, 70.

E.

Eggleston v. N. Y. & H. R. R. 35 Barb. 162.

F.

Farmer's Loan & Trust Co. v. Walworth, 1 N. Y. 433.
Feeter v. Heath, 11 Wend. 477.
Fiero v. Fiero, 52 Barb. 288.
Flight v. Chaplin, 2 Barn. & Ad. 112.
Frye v. Lockwood, 4 Cow. 454.

G.

Gibert v. Peteler, 38 N. Y. 165.
Gillet v. Maynard, 5 Johns. 85.
Gillig v. Maas, 28 N. Y. 191.
Glentworth v. Luther, 21 Barb. 145.
Goodspeed v. Robinson, 1 Hilt. 423.

H.

Hathaway v. Power, 6 Hill, 453.
Haydock v. Stow, 40 N. Y. 363.
Hearne v. Keene, 5 Bosw. 579.
Hearsey v. Pruyn, 7 Johns. 179.
Higgins v. Moore, 34 N. Y. 417.
Holly v. Gosling, 3 E. D. Smith, 262.
Holley v. Townsend, 2 Hilt. 34.

J.

Jacobs v. Kolff, 2 Hilt. 133.
Johnson v. Jones, 4 Barb. 369.
Johnson v. Taber, 10 N. Y. 319.
Jones v. Gardner, 10 Johns. 265.

K.

Ketchum v. Evertson, 13 Johns. 359.
Knapp v. Wallace, 41 N. Y. 477.

L.

Langley v. Warner, 1 Sand. 209.
Lawrence v. Taylor, 5 Hill, 107.
Lewis v. Payn, 8 Cow. 71.
Lloyd v. Matthews, 51 N. Y. 124.

M.

McComb v. Wright, 4 Johns. Ch. 659.
McClave v. Paine, 49 N. Y. 561.
McKechnie v. Sterling, 48 Barb. 330.
Mills v. Hunt, 20 Wend. 431.
Mooney v. Elder, 56 N. Y. 238.
Moore v. Moore, 5 N. Y. 256.
Morgan v. Mason, 4 E. D. Sm. 636.
Morrison v. Currie, 4 Duer. 79.
Moses v. Bierling, 31 N. Y. 462.
Mowatt v. McLelan, 1 Wend. 173.

N.

N. Y. & N. H. R. R. v. Schuyler, 34 N. Y. 30.
Nixon v. Hyserott, 5 Johns. 58.
North River Bank v. Aymar, 3 Hill, 262.

O.

Owing v. Hull, 9 Peters, 629.

P.

Penny v. Corwithe, 18 Johns. 499.
Perrin v. N. Y. C. R. R., 36 N. Y. 120.
Phillips v. Conklin, 58 N. Y. 682.
Pierce v. Thomas, 4 E. D. Sm. 354.
Powers v. Ingraham, 3 Barb. 576.
Pringle v. Spaulding, 53 Barb. 17.
Pugsley v. Murray, 4 E. D. Sm. 245.
Putnam v. Ritchie, 6 Paige. 390.

R.

Rathbon v. Budlong, 15 Johns. 1.
Redfield v. Tegg, 38 N. Y. 212.
Rice v. Peet, 15 Johns. 503.
Rossiter v. Rossiter, 8 Wend. 494.
Roat v. Puff, 3 Barb. 353.
Rowe v. Stevens, 35 N. Y. Sup'r Ct. 189; 53 N. Y. 621.

S.

Satterthwaite v. Vreeland, 3 Hun, 152.
Sizer v. Devereux, 16 Barb. 160.
Stone v. Sprague, 20 Barb. 509.
Stone v. Wood, 7 Cow, 453.
Story v. Conger, 36 N. Y. 673.
Story on Agency.
Sussdorff v. Schmidt. 55 N. Y. 320.

T.

Taylor v. Harlow, 11 Barb. 232.
Thornal v. Pitt, 58 N. Y. 683.
Torrey v. Bank of Orleans, 9 Paige, 649.
Townsend v. Orcutt, 4 Hill, 351.

V.

Van Eps v. Corp. of Schenectady, 12 Johns. 436.

W.

Weed v. Case, 55 Barb. 534.
White v. Madison, 26 N. Y. 118.
White v. Williams, 48 N. Y. 344.
Williamson v. Brown, 15 N. Y. 354.
Wood v. Perry, 1 Barb. 114.
Woodruff v. Hurson, 32 Barb. 557.
Worrall v. Munn, 5 N. Y. (1 Seld.) 229.
Wooley v. Constant, 4 Johns. 54.

MANUAL

OF THE

LAW OF REAL ESTATE BROKERS.

CHAPTER I.

DEFINITIONS.

The term Broker is derived from the Anglo-Saxon word *brucan*, signifying the discharge of an office, and is legally defined as one who is engaged for another in the negotiation of contracts relative to property with the custody of which he has no concern.

A Real Estate Broker is one who negotiates the sale or purchase of real property, and who sometimes, in addition to that duty, procures loans on mortgage security, collects rents, and attends to the leasing of houses and lands. *Bouvier's Dict.*, title Broker.

In the case of Rowe *v.* Stevens (35 *N. Y. Sup'r Ct. Rep.* 189), exception is taken to the use of the word *broker* in this connection, as follows: "The class of persons in this city who are employed by owners of lands to find a purchaser for them, or by those desirous of purchasing to procure a vendor for them, . . . are not in any legal or proper sense brokers; nor are they employed as such, although they are usually called by others, and style themselves so, and are in the habit of charging a percentage or broker's commission for their service. For while a broker is one who makes a bargain for another, and receives a commission for so doing—an agent, employed among merchants and others to make contracts between them for a compensation commonly called brokerage—no bargain or contract whatever is made by those who act as middlemen or intermediaries between vendors and purchasers of lands; nor, as the business is usually conducted, are they employed by either party to make a bargain or contract. They are employed for the mere purpose of finding a person who will buy the

land of their principals, or sell to him such land as he may want, and their compensation is earned whenever their principal purchases the land from, or sells it to, the person so brought to him."

Without discussing at this time the merits of the objection raised by the learned justice, it would seem from the derivation of the term given above, that it is not, so far as its ordinary meaning is concerned, improperly applied to the class of persons under discussion. The courts have repeatedly accepted the present definition, and popular use has given it a determinative signification. The rights of brokers and of persons dealing with them are ascertained by the nature and circumstances of the employment and authority, and not by the terms they may be addressed in.

CHAPTER II.

AUTHORITY OF BROKER.

An old law-writer says: "That Power of acting which one Man has, being transferred to another, is called an Authority, and this the Law allows of; for as a Contract is no more than the Consent of a Man's Mind to a Thing, if such Consent or Concurrence appears, it would be very unreasonable to oblige him to be present at the Execution of every Contract, since it may be as well performed by any other Person delegated for that Purpose." *Bac. Ab.* title Authority.

The relation of principal and agent is always a voluntary one, and springs from a contract to which the assent of the parties is essential. A broker may be employed by a written instrument or by word of mouth. Fiero *v.* Fiero, 52 *Barb.* 288. It is not, however, necessary that the authority should precede

the acts of the broker; they may become the principal's by his subsequent approval or ratification of them. It is a maxim of the law that "a subsequent assent to an assumed agency is equivalent to a previous authority."

Although it is usual for the principal to give simply oral authority to his real estate broker, yet the latter for his own protection should obtain, whenever possible, his appointment in writing. There can then arise no question of employment. This authorization need not be in any particular form, provided it expresses the relation of the parties, and the object of the employment. It may be worded as follows:

"New York, Jan. 1, 1876.

"To John Doe:

"You are hereby authorized and employed to negotiate the sale of my property, No. 1,000 Blank Street, upon the following terms: $5,000 in cash, and $5,000 upon mortgage at seven per cent. for five years.

"Yours, &c., "RICHARD ROE."

This form may be altered to conform to

the circumstances, and any special powers may be added.

Bearing in mind the definition of a broker previously given, that he is "one who *negotiates*," it is apparent that the mere act of placing property in the hands of a broker does not, in the absence of any express directions, give him authority to make any agreement regarding it in the name of his principal. He is confined to negotiations for its sale, leasing, or pledging by mortgage, as the case may be; and he can not receive the purchase-money or give a deed. Higgins *v.* Moore, 34 *N. Y.* 417. The authority must be strictly pursued; and any act which substantially varies from it is void. Nixon *v.* Hyserott, 5 *Johns.* 58; Rossiter *v.* Rossiter, 8 *Wend.* 494. But the courts, in giving a construction, will apply the principle that all instruments must be construed according to the spirit as well as the letter. Taylor *v.* Harlow, 11 *Barb.* 232.

The Statute of Frauds, as re-enacted in our statutes, declares that "every contract for the leasing for a longer period than one year,

or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing and be subscribed by the party by whom the lease or sale is to be made." The following section, however, allows "every instrument required to be subscribed by any party under the last preceding section, to be subscribed by the agent of such party lawfully authorized." 2 *Edmonds St.* 139.

The courts, in construing these provisions hold that the authority of the agent to execute a contract may be oral. The rule in England was well settled in this respect before the passage of the statute in this State, and was followed here in McComb *v.* Wright, 4 *Johns. Ch.* 659. In Champlain *v.* Parish, 11 *Pai.* 405, the court said that there was nothing in the Revised Statutes which required that the agent of a vendor should have a written power to enable such agent to enter into an executory agreement for the sale of lands where the agreement was not under seal. An authority to *sell* has been held to

give the broker power to execute a contract, in the name of his principal, upon the terms proposed. Pringle *v.* Spaulding, 53 *Barb.* 21; Haydock *v.* Stow, 40 *N. Y.* 363. But he may not attach a seal to the instrument made under such an authority. Blood *v.* Goodrich, 12 *Wend.* 525.

Under an employment "to close a bargain" for the sale of real property, a broker is not authorized to sign the name of his principal to a contract of sale. Coleman *v.* Garrigues, 18 *Barb.* 60. In this case a broker was employed to sell real property, and to 'close the bargain" in case he could get a specified sum in cash, on the delivery of the deed. He thereafter signed a contract in the name of his principal for the sum mentioned, agreeing to give a warranty deed with full covenants, and a perfect title, within thirty days. The court, MITCHELL, J., said: "The authority to Malloy (the broker) was merely 'to close the bargain.' It is well known that the general agency of brokers of real-estate is limited to finding a buyer or borrower who will assent to the terms of the

seller or lender, and then bringing the parties together."

"In dealing in real-estate, the authority to sign the contract is never understood to be granted from a mere authority to make a bargain. An agent, within the meaning of the Statute of Frauds, who can sign the name of the owner of lands to a contract for its sale, is not one who has a mere authority to make a bargain for the sale, but one who is made the owner's agent to *sign* his name to the contract. That agency may be by parol, but it is not included in a mere authority to sell."

The reasons assigned for this opinion are, with all respect, quite inadequate to support the conclusion arrived at. The contract executed by the broker was clearly in excess of his authority, and was objectionable on that ground alone. His power to make *a* contract was not in that case properly disputed; for the question was one of intent, and the phrase, "close a bargain," seems to us to imply as much as the word "sell," used in the same connection. In Pringle *v.* Spaulding,

already cited, the same court had occasion to pass upon the import of the latter expression; and, in the course of its opinion, contradicted the broad proposition laid down in Coleman *v.* Garrigues, and repeated the rule that a power to sell confers power to sign a contract in the name of the principal. This is in consonance with the elementary principle that an authority to do an act includes an authority to do whatever is necessary to accomplish it. The fact that the person employed is a real-estate broker, usually confined to mere negotiations, does not modify the force of the power.

It is to be deprecated that the rule is as stated; as its exercise might defeat the very object of the statute—the prevention of frauds and perjuries. That is a singular construction which permits an agent, upon mere oral authority, to pass an interest in lands, when the owner is restricted to a written instrument.

If, however, it is desirable that the broker have authority to execute a deed of the property, his power should be in writing—

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signed, sealed, and properly acknowledged. In that event he ceases to be a broker, and becomes an attorney-in-fact. Glentworth *v.* Luther, 21 *Barb.* 145. The same rule applies to this as to other powers, it is to be strictly construed; and a power to sell and grant lands and execute conveyances, gives the attorney no authority to enter into covenants, nor to do any act not actually necessary to transfer the property by deeds sufficient for the purpose. Nixon *v.* Hyserott, 5 *Johns.* 58. The power, therefore, should be full and complete, clearly expressing the authority given.

CHAPTER III.

RATIFICATION.

RATIFICATION is the confirmation or adoption of the act of another, done in behalf of the person ratifying. It may be express, that is, made in express and direct terms of assent, or implied from the conduct of the principal.

Generally, the principal may elect whether he will adopt the unauthorized act or not; but, having once ratified it, he is bound as if he had originally authorized it. But the ratification is invalid, if the principal, at the time of making it, did not know all the material facts. If these are suppressed or unknown, the law will not hold the principal liable, on the ground that his confirmation of the unauthorized act was secured by mistake or fraud. Owing *v.* Hull, 9 *Peters*, 629.

The subsequent adoption of an act, made

with full knowledge, is held to be equivalent to a prior authority, and refers back, therefore, to the time the act was done. If at that time, however, there was no competent principal in existence, the ratification cannot avail; for no contract is valid unless there are parties living at the time it is made, who are capable of contracting.

Where knowledge that an agent has exceeded his authority, comes to the principal, and he does not desire to accept the act, he must express his dissent within a reasonable time. If he fail to do this, an assent will be presumed, especially where the principal has received the fruits of the agency. Bridenbecker *v.* Lowell, 32 *Barb.* 9. What is a reasonable time, depends upon the circumstances of each case. The principal is not called upon to express his dissent by notice at the earliest possible moment. Clarke *v.* Meigs, 10 *Bosw.* 337. But after fair and reasonable opportunity, his silence will be construed as consent.

There can be no partial ratification of an unauthorized act, for the principal cannot

take the benefits of the transaction, and avoid its penalties. Ratification of a part adopts the whole. Farmers' Loan and Trust Co. *v.* Walworth, 1 *N. Y.* 433.

Parol ratification of an agent's *sealed* contract, where there was no authority to make such a contract, has been held insufficient—Blood *v.* Goodrich, 12 *Wend.* 525—although it might be valid as a simple contract, if no seal were required, as in case of a contract for the sale of lands. Lawrence *v.* Taylor, 5 *Hill*, 107.

CHAPTER IV.

DUTY OF BROKER.

WHERE instructions are given, it is the broker's duty to follow them implicitly. Property being placed in his hands for sale, he will seek a purchaser, ready and able to buy upon the terms specified. Barnard *v.* Monnot, 33 *How. Pr.* 440; 1 *Ab. Ct. Ap. Dec.* 108. If his employment be to procure a loan, his duty ends when he produces a person ready to make it. Corning *v.* Calvert, 2 *Hilt.* 56; Holly *v.* Gosling, 3 *E. D. Sm.* 262. He is only required to bring the minds of the parties together in an agreement; and, under the usual authority given, he can do no other act concerning the transaction.

It is not necessary that the broker personally attend the negotiations, and introduce the parties to each other, if he can show that the means he employed, or his communications, were the

causes which effectuated the agreement. It is sufficient if, through his instrumentality, the bargain was made. He need not even be acquainted with the purchaser; nor is it essential that the owner know that the party he is dealing with is the broker's customer. If the owner desires to protect himself, he may inquire whence the proposed purchaser acquired his information concerning the property. Sussdorff *v.* Schmidt, 55 *N. Y.* 320; Redfield *v.* Tegg, 38 *Id.* 212; Lloyd *v.* Matthews, 51 *Id.* 124; see *post*, Chapter VII. COMMISSIONS.

A broker cannot act for both parties to a negotiation, unless both are aware of his dual employment, and, notwithstanding it, agree to pay him commissions.

Much discussion has taken place in the courts of this State as to whether the old adage that one man cannot serve two masters, applies to the class of persons under consideration. Confusion has arisen from holding the real-estate broker in every case to the same rules that regulate the conduct of an agent. The foundation, however, upon

which these rules rest, is apparent from the cases given above. They should not, we think, be applied to those frequent cases which arise in land brokerage, where the broker acts as mere middleman, and exercises no discretion in the transaction. If the *nature* of the employment, and not the *appellation*, of the employee is borne in mind, there need arise no difficulty in determining the rights of the broker. The relations of the parties should be carefully scrutinized before applying a principle so general in its character. If there is found to exist a confidential relation, if the negotiation is left to the judgment of the broker, then there is no doubt of its application; but if, on the other hand, the broker simply acts as middleman (as in an exchange of lands, where the parties themselves examine the properties and fix the terms), there is no apparent reason for so strict a rule. *Story on Ag.* § 31.

The proposition as above laid down is supported by the case of Rowe *v.* Stevens (35 *N. Y. Sup'r Ct. Rep.* 189.) Upon the trial it appeared that the plaintiff, a real-estate

broker, was employed by the defendant to procure a purchaser for certain real-estate owned by the defendant, and situated in New York City. The plaintiff procured Winters & Hunt, who had previously employed him to sell their property, and with whom an exchange was made by defendant. Upon the exchange, Winters & Hunt paid the plaintiff his commissions. There was also evidence that the defendant knew, and fully understood, that the plaintiff was acting as agent for Winters & Hunt in the transaction; and, with this knowledge, and also of the fact that they had paid commissions, he afterwards promised to pay the plaintiff. Upon the trial the defendant's counsel, the above facts having been proved, moved to dismiss the complaint upon the ground that a broker (*i. e.*, a real-estate agent) could not take commissions from both parties. The motion was denied. In his charge to the jury the court said: "I understand the law to be, that, as a general rule, a broker cannot be employed by both parties, and collect a fee from each. There may be an exception—

there may be circumstances under which two parties would employ a broker to do a joint service, understanding that he would be sufficient for both, as two men may employ a lawyer to draw a contract or agreement, each of them having confidence in him, and they may agree that he shall be paid equally by them. I think a broker can serve both parties, and he can earn and receive compensation from both parties. But . . . to enable a broker to recover, as in this case, this must be understood by all the parties interested, Hunt & Winters, on one side, and Mr. Stevens on the other. They must understand, must be informed, that he is acting for both, because it is very clear if you employ a broker, you expect he is going to serve you, and not going to serve the other side—he is going to make the best bargain he can for you. But if you understand he is serving another and yourself, and you agree to it, I think he can recover his fee, under the circumstances."

Upon appeal to the General Term of the same court, Justice MONELL gave the opinion of the court. It reads as follows: "The ques-

tion is,—Can a real-estate agent, under such facts and circumstances as are disclosed in this case, claim compensation from each of the parties to an exchange of property? . . . In this case it was well known that the plaintiff was the agent of both parties, and expected compensation from each. The general principle which forbids a broker or agent from negotiating, as well for the purchaser as for the vendor of property, is founded on the policy of securing to the principal the best and most faithful services of the agent, which can not ordinarily be done, if the agent's efforts are at the same time also directed to making the best bargain for the other party. But the principle has its foundation in the actual or constructive fraud of the agent, who, by concealment or misrepresentation of his other employment, secures the confidence of his principal."

"Mr. Justice STORY says—*Story on Ag.* § 31—'It would be a fraud in a broker to act for both parties, concealing his agency for one from the other, in a case where he was intrusted by both with a discretion as to buying

and selling.' And again, 'It is plain that if this mutual agency is concealed, it might operate as a complete surprise upon the confidence of both parties.'"

"But I am unaware of any principle which forbids a broker or real-estate agent from acting as the agent of both parties, where it is done without concealment or other fraud. If, therefore, both vendor and purchaser employ the same agent, knowing that he is employed by, and is acting for both, I can see no reason why his acts should not be upheld, and he entitled to be compensated by both."

"In Cassard *v.* Hinman, 6 *Bosw.* 8, the contract of the defendant, which he had made through a broker, was repudiated, on the ground that while the broker persuaded the defendant to employ him as his agent, he was 'the secret and fraudulent agent of the other party, to induce the defendant to make the contract.' But there cannot be a fraud if all the parties are acting openly, in good faith, and without concealment."

"In Dunlop *v.* Richards (2 *E. D. Smith*, 181), which was an action by an agent who

had been employed by both vendor and purchaser, to recover compensation from one, the ground upon which the law rejects such dual employment is stated to be the secrecy of the employment, and the concealment of it from one and the other."

"And in Pugsley v. Murray (4 *E. D. Smith*, 245), it is held, that compensation may be taken from both parties, if, where with full knowledge of the facts that the broker was employed by both, and expected pay from both, the party actually promised to pay."

"Although there was some evidence of a promise to pay made by the defendant, with a full knowledge of the facts, the case was not put to the jury on that ground. But the promise might be available as showing a ratification of the acts of the plaintiff, after a full knowledge of all the circumstances, and such ratification would render the original employment obligatory upon the defendant. *Story on Ag.* § 210."

"Upon the question submitted to the jury under the charge of the court, they have found that it was mutually understood that

the plaintiff was acting as agent for the defendant, and for Hunt & Winters, and expected pay from each; and in considering the question raised by the motion to dismiss the complaint, we must assume the facts to be as found by the jury; and those facts disclose a fair and open transaction, which the law will sanction and uphold."

When this case was subsequently brought before the court of appeals, for review, that court affirmed the decision of the General Term. 53 *N. Y.* 621.

The broker must pay over all moneys received by him, for his principal, within a reasonable time. He should, therefore, keep a careful and true account of all his transactions with his employer, in order that, when called upon, he can render promptly and correctly a full statement of all collections and expenditures made by him in his confidential relation.

An agent is not permitted to deny the title of his principal to moneys collected by him for the principal. He can not keep moneys thus brought into his hands, by

claiming that the consideration moving to the principal was an illegal one, and consequently uncollectable. He is estopped by his relation as agent from setting that up as a defense.

CHAPTER V.

LIABILITY OF BROKER.

THERE are many rules regulating the duty and liability of agents which do not apply to a broker under the authority usually given him. But where he is employed to buy or sell upon the best terms he can obtain, or the principal relies upon his judgment or discretion in the negotiation, he becomes subject to those principles of law which are designed to afford protection to the employer, and call upon the employed for a diligent, cautious, and honest administration of his trust. With this larger relation in view, we will now briefly consider the liability of the broker to third parties and to his principal.

Liability of broker to third parties.—An agent who, at the time of making a contract, discloses his principal, is not personally responsible. Rathbon *v.* Budlong, 15 *Johns.* 1.

But unless this is done, he makes himself responsible in any way in which the actual principal would be liable. Morrison *v.* Currie, 4 *Duer*, 79; Brockway *v.* Allen, 17 *Wend.* 40. And it has been held that an auctioneer, who acts as agent of another person in the sale of property, is personally liable as vendor, unless at the time of the sale he make known the name of his employer. His general employment, which from its nature might seem to be sufficient evidence to buyers of his representative capacity, is not considered sufficient notice of agency. Mills *v.* Hunt, 20 *Wend.* 431.

If the agent make a contract in excess of his authority, he is liable for the whole. The party injured is not bound to pursue the principal for the portion authorized. Feeter *v.* Heath, 11 *Wend.* 477.

And where one enters into a covenant, describing himself as agent, but signs and seals it in his own name, he is liable personally. Stone *v.* Wood, 7 *Cow.* 453. "Whatever authority the signer may have to bind another, if he does not sign as agent or attor-

ney, he binds himself, and no other person." This rule, however, is limited to sealed instruments, for in case of a simple contract, the question will occur—Whose contract is it? If it appears that the agent intended binding himself, it is his to perform, and not the principals.

If an agent assume to act for another without authority, and draw another into a contract upon the assumption of such agency, he is liable in an action in favor of the party injured. In such a case, where no fraud is shown, *the agent will be presumed to have warranted his authority to make the contract.* And where there is fraud, an action for deceit may be employed as a concurrent remedy. In either case the party who has been misled by the representations of the pretended agent, may recover all damages naturally flowing therefrom. Dusenbury *v.* Ellis, 3 *Johns. Cases*, 70; White *v.* Madison, 26 *N. Y.* 118; Dung *v.* Parker, 52 *Id.* 494. In White *v.* Madison, Judge SELDEN, in discussing the ground upon which an agent is held liable in law in such cases, says: "If it were neces-

sary, in disposing of the present case, to decide the question, whether, as a general principle, one entering into a contract in the name of another, without authority, is to be himself holden as a party to the contract, I should hesitate to affirm such a principle. By that rule, courts would often make contracts for parties which neither intended nor would have consented to make. The contract, if binding upon one party, must be binding upon both; and where burdensome conditions precedent were to be performed by the party contracting with the assumed agent, before performance could be demanded by the other party, or where the agent should undertake to sell, lease, or mortgage the property of the assumed principal, or where credit should be given, which the responsibility of the agent would not justify, great injustice might result from such a rule. In those cases, and, I think, in all cases, where one pretending to be an agent has contracted as such without authority from the principal, the party contracted with, on learning the facts, must have the right to repudiate the

contract, and to hold the assumed agent immediately responsible for damages, without waiting for the time when an action might be maintained on the contract itself; and the damages must be measured, not by the contract, but by the injury resulting from the agent's want of power. Whenever a person enters into a contract as agent for another, he warrants his own authority, unless very special circumstances, or express agreement, relieve him from that responsibility. An action upon such warranty must always be appropriate where personal liability attaches to an agent, in consequence of his contracting without authority. In such action the plaintiff would be relieved from the necessity of showing performance of conditions precedent, and from the delay which the terms of the contract might require, if the remedy were limited to an action on the contract; and if special damages should be incurred in consequence of the agent's failure to bind his principal, such as the costs of an unsuccessful action against the principal to enforce the contract, they might be recovered. If the

act of the agent were fraudulent, an action for the deceit would lie, but it would be a concurrent remedy with an action on the warranty, and so, I apprehend, must be the action on the contract itself, if the cases which sustain such action are to be regarded as correctly decided."

If, however, the agent assume authority and make a contract which is void under the Statute of Frauds (an oral lease for two years, for instance), there is no contract from the violation of which damages, in a legal sense, can arise. Cagger *v.* Lansing, 43 *N. Y.* 550. Ignorance of the law, or reliance upon the promise of another, has never been held an answer to the statute; and, as such a contract could not have been enforced, there could ensue no damage from its violation.

An agent is not liable for money mis-paid him expressly for his principal, provided he has paid it over. Mowatt *v.* McLelan, 1 *Wend.* 173; Langley *v.* Warner, 2 *Sand.* 209. Where, however, notice is given him that his principal has no right to it, and he, notwith-

standing, pays it to the principal, he is personally responsible. Hearsey *v.* Pruyn, 7 *Johns.* 179. And he is also liable where the money is procured by his fraud. Frye *v.* Lockwood, 4 *Cow.* 454.

Should an agent act for a person legally incompetent to contract, such as an infant or lunatic, he will he held liable, although he disclose the name of his principal. In such a case there could be no valid relation of principal and agent.

From the foregoing references it will be seen that the liability of an agent to third persons must arise under one of the following conditions: 1. Negligence in not disclosing principal; 2. Assumption of powers never granted; 3. Fraudulent act; 4. Incompetent principal; 5. Personal covenant. The agent is never liable to another than his principal for mere neglect of duty. Denny *v.* Manhattan Co., 2 *Den.* 115; and 5 *Id.* 639: Colvin *v.* Holbrook, 2 *N. Y.* 126.

Liability of broker to principal.—The law calls upon one who acts for another to exercise the same care that a reasonable man em-

ploys in his affairs. The agent is but the instrument of his principal, and he is to do all things commanded of him honestly, fairly, and intelligently.

The broker cannot act for himself regarding his principal's business. Every benefit he may secure enures to the employer. Thus, if he buys property in his own name, under instructions to buy it for his principal, he holds it as trustee. Bridenbecker *v.* Lowell, 32 *Barb.* 9; Torrey *v.* Bank of Orleans, 9 *Pai.* 649. Again, if authorized to foreclose a mortgage, he cannot purchase the property at the sale for his own benefit. Moore *v.* Moore, 5 *N. Y.* 256. It matters not that he has paid the full price, and no injury has resulted to his principal, for the law declares the sale void *ab initio* on grounds of public policy. It thus wisely removes the cause of temptation. Dobson *v.* Racey, 3 *Sand. Ch.* 60. And the same general rule prevents the agent from filling an order with his own property, concealing the fact from his principal. Conkey *v.* Bond, 36 *N. Y.* 427. These confidential relations which obtain between the agent and

his principal have recently been passed upon by the court of appeals, and the above doctrines re-affirmed.

In Dutton *v.* Willner, 52 *N. Y.* 312, the court says: "It is a well-settled and salutary rule, that 'a person who undertakes to act for another shall not, in the same matter, act for himself.' It is only by a rigid adherence to this simple rule that all temptation can be removed from one acting in a fiduciary capacity to abuse his trust, or seek his own advantage in the position which it affords him. One consequence of a violation of the rule is, that the agent must, at the option of his principal, account to him for any profit he may have made by the transaction. It matters not how fair the conduct of the agent may have been in the particular case, nor that the principal would have been no better off if the agent had strictly executed his power, nor that the principal was not in fact injured by the intervention of the agent for his own benefit. If the agent deals with the subject-matter of his agency, or by departing from the instructions of his principal, obtains

a better result than could have been obtained by following them, the principal can claim the advantage thus obtained, even though the agent may have contributed his own funds or responsibility in producing the result. The rule which places it beyond the power of the agent to profit by such transactions, is founded upon considerations of policy, and is intended not merely to afford a remedy for discovering frauds, but to reach those which may be concealed; and also to prevent them by removing from agents and trustees all inducements to attempt dealing for their own benefit in matters which they have undertaken for others, or to whom their agency or trust relates. . . .

"All profits and every advantage beyond lawful compensation made by an agent in the business, or by dealing or speculating with the effects of his principal, though in violation of his duty of agent, and though the loss, if one had occurred, would have fallen on the agent, are for the benefit of the principal."

In Bain *v.* Brown, 56 *N. Y.* 285, defendant had been for many years the agent of

plaintiff's testator in the management of certain real-estate, and was authorized to negotiate its sale. In April, 1867, he contracted to sell it to Sudlow for $17,000, in the name of his principal, to whom he communicated the fact. Two days afterwards he opened a negotiation with Frankenstein, and closed a bargain with him for its sale at $26,000, $500 being paid him on account. Subsequently he made a written contract with Frankenstein in his own name, as owner. On the same day, Sudlow assigned to him the first contract. Defendant afterwards procured his principal, Bain, to execute deeds of the property to Frankenstein, on the representation that Sudlow had assigned to Frankenstein his contract of purchase. But he did not disclose the real facts to his principal. On the delivery of these deeds, the considerations in which defendant filled up, he received $26,000, and accounted to Bain for only $17,000, appropriating the balance to his own use. The court, RAPPALLO, J., held:—

"Assuming that the sale to Sudlow was real and made in good faith, yet when Brown dis-

covered that he could get $9,000 more for the property from another purchaser, and that the first purchaser was willing to surrender his bargain for a trifle, Brown, as a faithful agent, was bound to give to his principal the benefit of the advance, and could not rightfully appropriate it to himself; he was still acting in the business of his principal, and continued so to do and to correspond with him as such until long afterwards, when he consummated the sale by the delivery of the deeds, and receipt of the purchase money.

"The motives which induced Sudlow to throw up his purchase were wholly immaterial, and therefore the exception to the exclusion of evidence of the reason assigned by him to Brown for so doing, is not well taken. The object of the offer was, no doubt, to show that Sudlow did not surrender his contract to Brown, in pursuance of any previous understanding that it was held for the benefit of Brown; but as we have already said, it was not necessary to the plaintiffs' case to establish that any such previous understanding existed; and if it had been necessary, Sud-

low's unsworn statement would not have been competent evidence for the purpose of disproving it.

"If such a transaction as is exhibited by the undisputed facts of this case could stand for a moment, the well-established rules that an agent to sell cannot himself become a purchaser, and that one who undertakes to act for another in any matter shall not in the same matter act for himself, would be easy of evasion, and breaches of them so readily covered up by contrivances, that they would cease to be of any practical value. When agents and others acting in a fiduciary capacity, understand that these rules will be rigidly enforced, even without proof of actual fraud, the honest will keep clear of all dealings falling within their prohibition, and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it. Thus only can these rules be made useful in promoting fair dealing on the part of agents and trustees, and in preventing frauds."

In Charter *v.* Trevelyn (11 *Clark & Fin.*

714), a purchase by the agent of his principal's property confided to him to sell, was set aside as fraudulent after thirty-seven years had elapsed, the principal being, in the meantime, unacquainted with the facts.

CHAPTER VI.

LIABILITY OF PRINCIPAL.

The principal is held liable for all the acts and declarations of his agent, done and made within the scope of the authority given. And in cases where a third party has dealt with the agent in good faith, rightfully believing the agent was acting within the terms of his employment, the principal will be compelled to bear any loss that may occur, upon the ground that where one of two innocent parties must suffer, he shall be first called upon who has put it in the power of another to work the injury. Johnson *v.* Jones, 4 *Barb.* 369; Clark *v.* Metropolitan Bank, 3 *Duer*, 241. In the case of Bennet *v.* Judson (21 *N. Y.* 238), the court of appeals laid down the broad doctrine that the vendor of lands is responsible for material misrepresentations in respect to its location and qualities made by

his agent *without* express authority, and in the absence of any actual knowledge by either the agent or the principal whether the representations were true or false. There was no evidence that the defendant authorized or knew of the alleged fraud committed by his agent in negotiating the exchange of lands; nevertheless, it was held that he could not enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. It was conceded, however, that the principal, not having authorized or participated in the wrong, might rescind, when he discovered the fraud, on the terms of making complete restitution. Although this case has been criticised—Craig *v.* Ward, 3 *Keyes*, 387; Weed *v.* Case, 55 *Barb.* 534—as extreme in its doctrine, it seems to be in accordance with the principle already cited, and is supported, in a measure, by the case of Phillips *v.* Conklin, 58 *N. Y.* 682.

In many cases the *apparent* authority of the agent is considered the *real* authority, and the principal is liable to third persons who

deal in good faith with the agent upon it. This is especially so where the authority vested in the agent calls for a declaration from him of matters peculiarly within his own knowledge, and the making of the declaration forms part of the act which the principal expects the agent to perform. North River Bank *v.* Aymar, 3 *Hill*, 262; N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 *N. Y.* 30. It is a general maxim that authority to do an act, usually implies authority to do all things necessary for its performance. Thus in Heare *v.* Keene, 5 *Bosw.* 579, Lutz was employed by defendant as a general agent in the management of a theatre, and attended to all the money transactions concerning it. Rent falling due, the agent borrowed money from plaintiff with which to pay it, and preserve the lease. The defendant was held liable on the ground that the authority to borrow money and protect the lease was incidental to his general employment, and besides, the defendant retained the benefit of the transaction.

CHAPTER VII.

COMMISSIONS.

THE broker's compensation for his services is called his commissions. These, if not fixed by statute, are governed by usage or made the subject of special agreement.

The Revised Statutes of the State of New York—1 *Edm. St.* p. 658, 2d ed.—provide for brokerage on loans, as follows:

"No person shall directly or indirectly take or receive more than fifty cents for a brokerage, soliciting, driving, or procuring the loan or forbearance of one hundred dollars for one year, and in that proportion for a greater or less sum; nor more than thirty-eight cents, for making or renewing any bond, bill, note, or other security given for such loan or forbearance, or for any counter bond, bill, note, or other security concerning the same.

"§ 2. Every person who shall pay, deliver, or deposit any money, property, or thing in action, over and above the rate aforesaid, and his personal representatives, may, within one year after such payment, delivery, or deposit, sue for and recover the same of the person so taking or receiving such money, property, or thing in action, or of his personal representatives.

"§ 3. In case such suit shall not be brought within the time above prescribed, in good faith, or in case it shall be discontinued, or willfully delayed, then the overseers of the poor of the city or town where the offense was committed, may within one year after such neglect, discontinuance, or delay, sue for and recover the money, property, or thing in action so received, delivered, or deposited, from the person receiving the same, or his personal representatives, for the use of the poor of the county.

"§ 4. Every person who shall be liable to be sued by virtue of the foregoing provisions, shall be obliged and compellable to answer upon oath any bill that shall be preferred

against him, in the court of chancery for discovering the money, property, or thing in action so illegally received, and may be compelled by the decree of such court to return the same.

"§ 5. Upon the discovery of the money, property, or other thing so illegally received, and the repayment and return thereof, with the payment of the costs of such suit, the person making such discovery and return shall be acquitted and discharged from any other punishment, forfeiture, or penalty which he may have incurred by reason of having so illegally received such money, property, or other thing so discovered and returned."

The court of appeals have recently decided in Cook *v.* Phillips, 56 *N. Y.* 310, 1874, that this statute applies to all loans without regard to time. It appeared on the trial that defendant employed the plaintiff to go to a farm belonging to him, and situated some miles from the city of New York, to examine the same, and to estimate the value thereof, and also to procure a loan to be secured by a

mortgage on the farm. The defendant authorized the plaintiff to obtain a loan for three or five years for $20,000, if he, plaintiff, could obtain that amount; and if he could not obtain that amount, the defendant agreed to take $10,000. The plaintiff, in pursuance of this agreement, visited the farm and estimated its value; and, having made such estimate, he endeavored to procure a loan of $20,000 for the defendant, but succeeded only in getting $10,000, to be secured by a mortgage on the farm. The defendant in his agreement promised to pay to the plaintiff for all services, at the rate of two and one-half per cent. on the loan to be by him obtained. The defendant refused to accept the loan of $10,000, but judgment was given for the broker for the agreed percentage with interest. Upon review, the court, CHURCH, Ch. J., held that while it might be allowable to pay for extra services not usually necessary in procuring loans, in addition to the prescribed brokerage, yet any agreement to that effect should be separate, so that it may be seen whether the compensation is reasonable,

or whether it is a cover for demanding a larger commission. "Several constructions of the statute have been suggested: 1. That it should be taken literally; 2. That it should only apply to loans for one year; 3. That the prescribed commission should be the rate per year; 4. That the words 'for one year' should be disregarded. To adopt the literal construction would render the statute utterly ineffective and useless, as it would apply only when the loan was for precisely one year; while either of the other constructions requires the interpolation of words not in the statute, or the omission of words found there." Referring to the cases of Corp *v.* Brown, 2 *Sand.* 293, and Broad *v.* Hoffman, 6 *Barb.* 177, decided in 1848 and 1849, the court considered that they controlled the present case. Under these the plaintiff could recover but fifty dollars for negotiating the loan, as the length of time for which the loan is to run does not govern.

The broker is entitled to his commissions when he has faithfully performed his duty. The law always implies a promise to pay a reasonable

price for services rendered at the request of another.

From the cases already cited, it is apparent that the broker may recover commissions in a case where his negotiations are successful by proving these facts: 1. That he was employed; 2. That he was the procuring cause of the sale, exchange, &c. Should the negotiations, however, not be consummated by an agreement between the parties, owing to the capricious refusal of the principal to close the transaction, the broker is still to be compensated, should he establish: 1. Employment; 2. The production of a person by the broker who was ready and willing to accept the terms offered, *and able to meet the obligation on his part.* Barnard *v.* Monnot, 1 *Ab. Ct. Ap. Dec.* 108; Lloyd *v.* Matthews, 51 *N. Y.* 124; Sussdorf *v.* Schmidt 55 *Id.* 320; Jacobs *v.* Kolff, 2 *Hilt.* 133; Barnes *v.* Roberts, 5 *Bosw.* 73; Satterthwaite *v.* Vreeland, 3 *Hun*, (*S. C.*) 152.

A number of cases bearing upon the question of commissions will now be considered.

1. Broker must make sale at specified

PRICE.—In Satterthwaithe *v.* Vreeland, *supra*, plaintiff was employed to sell a farm at $1,500 an acre. He opened negotiations with Torrey, who refused to purchase at that price. Subsequently defendant sold the farm to Torrey for $1,200 an acre. The court, DANIELS, J., says: "A sale for the price at which the plaintiff was empowered to sell, was in the nature of a condition on which his right to commissions was, by the terms of his employment, rendered dependent. . . . To maintain a claim by him for his commissions, it was necessary that he should be able to show that he had either procured a purchaser for the property at the price he was empowered to sell, or that the defendant had deprived him of the opportunity to do so while the privilege to sell continued. . . . By the unwritten or general employment, no time whatever was fixed or designated, during which the plaintiff was authorized to sell at $1,500 an acre. That bound the defendants as owners for no particular period of time; and for that reason it could not prevent them from making a *bona fide* sale of the farm at a

less sum, in case they elected to do so, without incurring any liability for commissions to the plaintiff. All that he was entitled to under that employment was a reasonable opportunity to find a purchaser at $1,500 an acre; and after he had failed to do so, ... the defendants were at liberty to sell at less without becoming liable to the plaintiff for commissions. That resulted directly from the terms of the employment, and their right to dispose of the property owned by them.

". . . . By making a sale on such terms while the authority continued, he would become entitled to his commissions; but, as he failed to do that, no right to them was created. Such were the plain terms of his employment, and, as long as he failed to perform them, the defendants were under no obligation to pay him what they had agreed to pay only as a compensation for performance.

"That was the import of the contract under which he was employed; and the propriety of the consequences deduced from it is sustained by authority. These cases, as well as those relied upon by the plaintiff, require

that the broker shall find a purchaser at the price for which he has been authorized to sell, where a specific price may be fixed, before he can lawfully demand his compensation, when he has not been prevented from selling by any improper interference of the owner during the time allowed to effect a sale. The relation is one of contract, requiring the application of the same legal principles as control the rights of parties under similar agreements."

Of course, if the broker sells property at a price less than that specified, and the principal ratifies the sale, the latter must pay commissions.

2. BROKER MUST SELL WITHIN TIME SPECIFIED.—Where a broker was authorized to sell certain property within a specified time, and informed his principal, upon its expiration, that he could do nothing with the property, it was held that he was not entitled to commissions. Holley *v.* Townsend, 2 *Hilt.* 34.

3. BROKER MUST SHOW EMPLOYMENT.—An owner cannot be enticed into a liability for commissions without his consent. A mere

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volunteer, after the owner had positively refused to employ him, cannot, by inquiring the price and sending a purchaser, recover commissions on the sale. Pierce *v.* Thomas, 4 *E. D. Smith*, 354; Goodspeed *v.* Robinson, 1 *Hilt.* 423.

4. Broker not responsible for principal's failure to fulfil.—If the broker has procured a competent purchaser, ready to perform the contract on his part, and it is subsequently found, upon examination, that the title of the principal is defective, the broker having fulfilled all that the terms of his employment called for, is entitled to his brokerage. Doty *v.* Miller, 43 *Barb.* 529. The case of Knapp *v.* Wallace, 41 *N. Y.* 477, is sometimes cited as carrying this principle still further so as to cover a defect in the title of a person, from whom the broker is employed to purchase, but the case does not warrant this. The employment shown, and upon which the principal agreed to pay commissions, was an employment to aid and assist in making the contract; so that, when the court says: "It was no defense to the plain-

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tiff's claim, that the title to the property was defective. Messmore (the broker) had not undertaken that it should be good. The contract between him and the defendant did not place his right to compensation on such a condition;"— it bases its decision upon the terms of the employment, and not on so broad a principle as that sought to be established.

The broker must produce "a person able to meet the obligation on his part." Were it otherwise, he could bring up a dummy or irresponsible person and claim his commissions. The principal must be *satisfied* with the proposed purchaser. But we would draw the same distinction here that should, we think, determine the right of the broker to act for both parties to a negotiation. If the broker occupies the relation of middleman, he should not be expected to do more than to attend to the negotiation. And where the parties fix their own terms, and arrange all the details, it would seem to be a piece of injustice to call upon the broker as a guarantor of their contract. In such a case they should protect themselves by inquiries.

5. CONTRACT NEED NOT BE PUT IN WRITING TO ENTITLE BROKER TO RECOVER.—This was so held in the Hippodrome case, (Barnard *v.* Monnot, *supra*,) where Justice HUNT says: "The plaintiff was non-suited, upon the ground that he could not maintain an action for his compensation until the agreement for the sale of the property had been reduced to writing, and signed by the parties. The General Term, by their written opinion, concurred in this view of the law. I think the decision was erroneous. The duty of the broker consisted in bringing the minds of the vendor and vendee to an agreement. He could do no more." See also Mooney *v.* Elder, 56 *N. Y.* 238.

6. PRINCIPAL, WHO INTERFERES, STILL LIABLE.—Placing his property in the hands of a broker to negotiate a sale, does not debar the principal from employing other brokers, or negotiating a sale himself. If, however, the broker has procured a proper customer, the principal cannot, by taking the matter into his own hands and completing it, deprive the broker of his compensation. McClave *v.*

Paine, 49 *N. Y.* 561; Chilton *v.* Butler, 1 *E. D. Smith*, 150; Morgan *v.* Mason, 4 *Id.* 636. Nor can the principal, where a broker employed to sell, to the exclusion of all other brokers, has fulfilled his duties, refuse to pay commissions on the ground of a sale through another broker. Moses *v.* Bierling, 31 *N. Y.* 462.

7. Broker who first sells entitled to commissions.—Where property is given to a number of brokers, the principal is only responsible for commissions to the one who effects the sale. Sussdorff *v.* Schmidt, *supra.* But we are of opinion that, on general principles, the employer may be called upon by a broker who has rendered services, for a fair return for his labor and disbursements. How far custom may regulate this has never been adjudicated upon, in this state, so far as we know.

8. Broker must be procuring cause of sale.—We have already seen that where a sale is made, the broker, in order to recover, must show that he was the procuring cause. The question is one for the jury to determine from the evidence. Thornal *v.* Pitt, 58 *N. Y.* 683; Sussdorff *v.* Schmidt, *supra.*

9. Broker need not know customer.— In the case last cited, the evidence on the part of the plaintiff showed that defendants promised him a part of the profits of the property when they sold. The (plaintiff) broker suggested to defendants the best mode of selling the property. He also procured maps and painted signs which he put up in different places, and inserted advertisements in the Long Island *Star*, wherein he described himself as broker. Marwig and Eckersdorff, the latter a broker, frequented a saloon where one of the maps was displayed, and were led by it to examine the property. Plaintiff, in the meantime, had put an advertisement in another newspaper, when he was requested by defendants not to make any further efforts, as they were negotiating a sale, upon which, if effected, he should have his commissions. The court held that from this evidence the jury might fairly infer that the purchaser was secured by the efforts of the plaintiff; and that the claim of the plaintiff to brokerage was recognized by the defendants when they promised to pay it. "It

did not appear that the defendants knew that Eckersdorff and Marwig came to purchase in consequence of information obtained through the plaintiff; and it may be that this fact, if it existed, was designedly withheld from them so as to secure commissions for Eckersdorff. However that may be, it is not conclusive against the plaintiff. If he was the procuring cause of this sale, his right to compensation would not be affected by the circumstance that the defendants were ignorant of it at the time, nor should he be prejudiced by the acts of others." "It is not indispensable that the purchaser should be introduced to the owner by the broker, nor that the broker should be personally acquainted with the purchaser; but in such cases it must affirmatively appear that the purchaser is induced to apply to the owner through the means employed by the broker."

Again in Lloyd *v.* Matthews, 51 *N. Y.* 124, the court of appeals held that if the communications of the broker were the cause or means of bringing the purchaser and owner together, and the sale resulted in consequence

thereof, the broker was entitled to recover. That the purchaser is the broker's customer, need not be known to the owner. It is sufficient if he is such in fact.

CHAPTER VIII.

THE CONTRACT OF SALE.

As the broker is often called upon to prepare the contract of sale, he should at least be familiar with the general principles of law relating thereto. In the following chapter an attempt is made to sketch these, and to offer such practical suggestions as may present themselves.

The common law recognizes four requisites to every contract, viz.: parties, consideration, subject-matter, and mutual assent. In addition to these, we have seen that a contract for the sale of land, or of an interest therein, must be in writing and subscribed by the party by whom the sale is to be made, or his agent lawfully authorized. And the requirements are the same where an exchange is contemplated. Rice *v.* Peet, 15 *Johns.* 503.

A properly drawn contract of the kind under consideration should, therefore, contain :

1. The names of the parties.
2. The consideration, or price to be paid.
3. A description of the property.
4. The terms.
5. The agreement.
6. The subscription.

We will now briefly examine these separately :

1. PARTIES.—Only persons having legal capacity can make a valid contract. One who is over the age of twenty-one years, and in possession of his faculties, is generally considered competent. Infants (that is, persons under the age of twenty-one years), married women, lunatics, idiots, and drunkards, are usually classed as incompetent; but the enabling statutes of the state of New York have taken married women out of this catalogue in a measure. Where a married woman is possessed of real-estate as her separate property, she may bargain, sell, and convey such property, and enter into any contract in reference to the same, with the like effect in all

respects as if she were unmarried. See *Laws* 1860, ch. 90; 1862, ch. 172.

Where the contract is to be executed by an agent, it must be drawn in the name of his principal to be binding on the latter. It is not sufficient to say "John Jones, as agent for Simeon Smith, party of the first part," for it is held that the contract in such case is simply that of the agent. "Simeon Smith, of New York city, party," &c., is the proper description. Townsend *v.* Orcutt, 4 *Hill*, 351.

The parties should be described with certainty, and to that end it is well to insert their respective residences.

2. CONSIDERATION.—The consideration for the sale must be a legal one, as an immoral or fraudulent consideration renders the contract invalid. It may be either *good* or *valuable*. The former is such as natural love and affection springing from blood or relationship; the latter is such as money, lands, goods, services, marriage, or any other thing deemed an equivalent for the sale. The whole consideration is required by the Statute of Frauds to be expressed in writing.

3. Description.—The premises proposed to be conveyed should be accurately described. Too little thought is usually bestowed upon this important portion of the contract; and it is frequently the case that parties seeking specific performance in equity, or claiming damages for a breach at law, find that to pursue either remedy is quite impossible. The contract should be so specific as to give to the conveyancer every particular necessary for the preparation of the deed.

The word *land* comprises not only the ground or soil, but also all structures and things attached thereto. It also includes water, which should be described as land under water. The word "building," therefore, need not be employed, for an agreement to convey a lot will carry everything permanently connected with it. In White *v.* Williams, 48 *N. Y.* 344, a lot and building were contracted for. It was held by the court that the grantors must convey the building and lot *on which it is,* although the boundaries specified would not embrace the building.

In drafting the description care should be exercised in selecting as a starting-point some natural or well-defined and permanent monument or object. If it be difficult to describe the plot, it is not difficult nor expensive to have it surveyed. If there is not time to do this before the execution of the contract, it should be done immediately afterwards, and before the deed is prepared. By this means, encroachments or mistakes in quantity are at once discovered, and a fruitful source of litigation may, perhaps, be avoided. Regarding description of quantity, it should be borne in mind that where, in the absence of fraud, property is sold in bulk as "my certain farm at Rosedale of forty acres," or where, after boundaries are mentioned, the number of acres is given, the vendor is not compelled to make good any deficiency. In such a case the words denoting quantity are merely words of description, and do not amount to a warranty. Roat *v.* Puff, 3 *Barb.* 353; Johnson *v.* Taber, 10 *N. Y.* 319. In Hathaway *v.* Power, 6 *Hill,* 453, it was held that a conveyance of "lot 14," "it being 160 acres,"

would transfer the entire lot, although it consisted of 185 acres.

Where land is bounded *by* a pond or stream above high water, and not navigable, or *by* or *along* a public highway, the vendee takes to the center of the pond, stream, or highway, as the case may be, subject to the rights of the public. Canal Appraisers *v.* The People, 17 *Wend.* 570; Perrin *v.* N. Y. C. R. R. Co. 36 *N. Y.* 120; Sizer *v.* Devereux, 16 *Barb.* 160. If, however, the vendor is not the owner of the land lying in the highway in front of the conveyed premises, the terms of the deed are satisfied by a title running only to the roadside. Dunham *v.* Williams, 37 *N. Y.* 251. Of course, where the number of feet is designated, or the property is bounded by the *side* of the highway, the above rule does not hold good.

4. Terms.—In this part of the contract the terms and conditions should be clearly and fully set forth. The time for payment, delivery of deed, and taking possession of the property, ought to be provided for.

5. Agreement.—The agreement pervades

the whole contract, for without mutual assent, it would be without a vital element. There will be an agreement on one side to sell at a price, and an agreement on the other side to buy at that price. There will also be a promise to deliver a deed of such description as the vendor may be willing to make, to the vendee; together with any other special covenants that may be necessary.

In Van Eps *v.* Corp. of Schenectady (12 *Johns.* 442), GATES, J., says: "By covenanting to execute *a deed*, no greater duty or obligation can be intended than to execute a conveyance or assurance of the property, which may be good and perfect, without warranty, or personal covenants." No covenant, in such a case, can be intended by implication or otherwise. This rule was followed in Ketchum *v.* Evertson, 13 *Johns.* 359, where defendant stipulated *to give a deed* of the premises contracted to be sold to the plaintiff. *Held*, that this covenant was fulfilled by executing a conveyance of the property without warranty or personal covenants. The court, SPENCER, J., says in the course of his opinion:

"Courts of law can exact no more of parties than the performance of their contracts, according to the intention manifested by the terms used by them. When, therefore, it is agreed that a deed shall be given, nothing more can be exacted than an instrument sufficient to pass the estate of the party who is to give a deed. If it be required that the deed should contain covenants of warranty, nothing is more simple than the insertion of that stipulation in the contract. . . . A deed does not, *ex vi termini*, mean a deed with covenants of warranty, but only an instrument with apt terms conveying the property sold."

"The deed was to be given by the defendant alone; the agreement is silent as to the defendant's wife uniting in the conveyance, and it would be an entire interpolation to say, that the defendant agreed that his wife should join."

But an agreement to convey and release the property to the vendee by "a good and sufficient deed," calls upon the vendor to give good title free from all valid claims. Jones *v.*

Gardner, 10 *Johns.* 266; Story *v.* Conger, 36 *N. Y.* 673.

6. SUBSCRIPTION.—The contract when completed to the satisfaction of the parties should be subscribed. It need not be sealed. The signatures, as well as the body of the instrument, may be in pencil. 12 *Johns.* 102. A printed name is not sufficient. 8 *Barb.* 130. It must be subscribed at the end. 26 *Wend.* 341. If signed by the broker, under authority from his principal, he will sign his principal's name first, and add to it "by Richard Roe, his agent." If signed by the vendee alone the contract is void, Debeerski *v.* Paige, 36 *N. Y.* 539; but, it seems that where the contract is signed by the vendor and delivered to and accepted by the vendee, the latter is bound by its terms. Worrall *v.* Munn, 1 *Seld.* 229.

The contract having been signed it is ready for delivery. Until this is done, either party may withdraw, as its legal execution is incomplete. Sometimes the contract is drawn in duplicate, and each party is given a copy; and sometimes the broker or attorney holds

by request the original for the benefit and protection of both parties. In either case there is a delivery and acceptance.

After the contract has been executed, all prior engagements between the parties relating to the same subject-matter are considered as merged in it. It is presumed to have been made with care and deliberation, and with a knowledge of, and assent to, its various provisions. It is considered, in law, as containing the complete understanding of the parties; and, except in cases of fraud or mistake, parol evidence contradicting it will not be admitted.

Where, however, the parties mutually agree to an alteration or modification of any of its provisions, and a third party has not acquired any rights under it, it may be altered to correspond to the new arrangement, or be made to conform more precisely in ambiguous points to the real intent of the parties. Wooley *v.* Constant, 4 *Johns.* 54; Penny *v.* Corwithe, 18 *Johns.* 499.

But it is a well-settled rule that where a contract, sealed or unsealed, has been altered

in a material part by one of the parties without the consent of the other, it will be entirely void. Lewis *v.* Payn, 8 *Cow.* 71.

CHAPTER IX.

RECORD OF CONTRACT AND NOTICE.

RECORDING an instrument does not add any to its force as between the parties. But the record is valuable for two reasons: it preserves the document—for it can be read in evidence—and it gives such notice to subsequent purchasers and incumbrancers as to bind them. This doctrine of notice, however, is only applicable to those instruments which are contemplated by the provisions of recording act.

Every conveyance of real estate must be recorded in the proper register's or county clerk's office. If not recorded it is void, as against subsequent purchasers or encumbrancers in good faith, for value, whose convey ance is first duly recorded. 1 *Rev. St.* 756, § 1; *Edm. St.* 707.

In sec. 38 the term "conveyance" is de-

fined as embracing every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged, or assigned, or by which the title to any real-estate may be affected in law or equity, except wills, leases for a term not exceeding three years, and *executory contracts for the sale and purchase of lands.*

Again (§ 39), these agreements *may* be recorded when properly acknowledged, but the terms of the act have never been construed as declaring such record constructive notice to subsequent purchasers. Any writing, to have that effect, must be required by the statute to be recorded.

In Boyd *v.* Schlesinger, 59 *N. Y.* 309, GROVER, J., says: "We have not been referred to any local statute particularly providing for the recording of contracts for the sale of land in the city of New York. So far as I have discovered, there is no such statute, and the recording of such contracts there has no effect except what is given by the general law of the state. Section 71, volume 3, *Revised Statutes* (5th Ed.), page 59, among other

things, provides that contracts for the sale of land may be acknowledged or proved, as provided in the chapter for the recording of conveyances of lands, &c., and when so proved or acknowledged may be recorded; and the record thereof when recorded, or a transcript thereof, may be read in evidence in the same manner as a conveyance recorded in such county. Section 70 expressly excludes contracts for the sale of lands from being included in the term conveyance, as used in the chapter. If these are the only statutory provisions applicable in the city of New York (and I know of no other), the only effect of recording the contract is to preserve the evidence and facilitate the proof. It in no other way affects the rights of the parties. The record of such contract would not be constructive notice to subsequent purchasers or incumbrancers. How such record can be regarded as a cloud upon the title, authorizing an action to cancel it, is not apparent. But as this question was not raised upon the trial, or argued by counsel in this court, I shall not further examine it. Under

such circumstances it cannot be decided here."

If, however, the purchaser has gone into possession under a contract which has been recorded, subsequent purchasers are chargeable with notice (see Gillig *v.* Maass, 28 *N. Y.* 191), possession being considered sufficient notice where it is inconsistent with the title about to be purchased, and puts the party upon inquiry.

It may not be out of place to examine briefly, in this connection, the doctrine of notice. And first, it is a fundamental proposition, that notice to the agent is, in general, notice to the principal: provided the agent becomes acquainted with the facts while engaged for the principal in the very transaction which is the subject of controversy. In such case it is the policy of the law to take it for granted that the principal knows whatever his agent knows. There is no difference, in this respect, between personal notice and constructive notice, as, otherwise, the principal by employing an agent could avoid it. Bank of U. S. *v.* Davis, 2 *Hill*, 451.

Notice is of two kinds: actual and constructive. The first is, where knowledge is brought home to a party directly, and embraces all degrees and grades of evidence from direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice. It is a question of fact. Constructive notice is a legal inference from established facts. It "is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted." *Story Eq.* § 399. The record of a deed is constructive notice, and it is of no consequence whether the subsequent purchaser has actual notice of the original or not. He is put upon inquiry by the record, and is presumed to have requisite notice. The rule may be thus stated: A purchaser who has knowledge of any fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that he is about to buy, is presumed either to have made the inquiry and ascertained the extent of such right, or to have been guilty of such

negligence as will be fatal to his claim of being a *bona fide* purchaser.

This presumption may be repelled by evidence that the purchaser, although set upon inquiry, failed to discover the prior right after exercising due diligence. As to what would be considered proper diligence, depends upon all the circumstances. If the information possessed by the party is sufficient, upon being followed up, to lead to a discovery of the extent of the prior right, the conclusion of law necessarily obtains that it amounts to implied notice. Williamson *v.* Brown, 15 *N. Y.* 354.

It is advisable, perhaps, to record the contract. Although such an act does not of itself amount to notice, yet, could it be shown that a subsequent purchaser had *seen* the record, we know of no reason why the above principles should not apply.

CHAPTER X.

RELATION OF VENDOR AND PURCHASER.

As soon as a legal contract for the sale of lands is made and delivered, equity regards the purchaser as the owner. The vendor still retains the legal title, it is true, but he holds it only by way of lien or security for the unpaid purchase-money. His interest is in the proceeds, and is considered as personal property, passing, should he die, to his executor or administrator, and not to his heir. This lien may, of course, be waived.

The contract does not of itself give the vendee permission to enter upon the property. Eggleston *v.* N. Y. & H. R. R. R. Co., 35 *Barb.* 162. Should he do so, and afterwards refuse to pay the installments of the purchase-money when due, he may be treated as a trespasser, and an action of ejectment will lie. Notice to quit is unnecessary,—Powers

v. Ingraham, 3 *Barb.* 576,—for the relation of landlord and tenant does not exist. Stone *v.* Sprague, 20 *Barb.* 509. As this legal remedy of the owner is usually vexatious, there may be prepared and delivered, at the time of the contract, should the vendee desire immediate possession, a short lease for a term extending to the date fixed for the consummation of the contract. A form for this purpose can be found in the APPENDIX. By this means the relation of landlord and tenant is established, and the owner may take advantage of the statutes made for its protection.

Where the vendee enters upon the premises under the contract, and in good faith makes improvements thereon, and the vendor, owing to an imperfect title, is unable to complete the sale, the vendee has a lien upon the land for the value of such improvements. Gibert *v.* Peteler, 38 *N. Y.* 165; Putnam *v.* Ritchie, 6 *Pai.* 390.

It seems to be settled that while the vendee is entitled to any benefits happening to the land after the contract, he is also compelled to bear any loss occurring without

the fault of the vendor. So that if a building standing upon the land is destroyed by fire, the purchase-money must still be paid. Clinton *v.* The Hope Ins. Co., 45 *N. Y.* 454; McKechnie *v.* Sterling, 48 *Barb.* 330.

Where, however, there is a mutual abandonment, which may be agreed upon by parol, the purchaser can only recover the money paid by him with interest, and he has no claim for labor or improvements. Gillet *v.* Maynard, 5 *Johns.* 85; Wood *v.* Perry, 1 *Barb.* 114.

For a discussion of the principles of law regulating the rights of vendor and vendee to rescind, the construction and performance of the contract, and the mutual obligations in law of the parties, the reader is referred to the law writers on these topics. No broker should attempt to pass upon them without competent legal advice

CHAPTER XI.

INTEREST AND USURY.

THE question of usury frequently springs from the most innocent of transactions. Without intending to transgress the law, parties often stipulate to take a greater rate of interest for the loan of money than the law allows, and unexpectedly incur the penalty. It is also undoubtedly true that ingenious men have long taxed their brains for schemes whereby to circumvent the statute, and in some instances have managed to avoid it with marked success. While the law, however, remains upon the books, every citizen is called upon to observe it, without regard to its moral or economical aspect.

The usury laws of this state are substantial re-enactments of the English statute. They are given in full in the APPENDIX. After providing that the rate of interest upon a

loan or forbearance of any money shall continue to be seven dollars upon one hundred dollars for one year, they prohibit the taking, directly or indirectly, of any larger sum by any person or corporation, and declare that all contracts, bills, bonds, conveyances, &c., providing for the payment of or reservation of such larger sum, shall be void. The receipt of more than the legal rate is also declared a misdemeanor.

The constructions placed upon these acts by the courts of the state seem to establish the following propositions: 1. There must be an intent to take more than the legal rate of interest; 2. Both parties must be cognizant of the *facts* which constitute the usury; 3. The loan must be of money; 4. There must be an understanding that the payment of the money loaned is not to depend upon a contingency; and, 5. There must accrue to the lender a gain beyond the rate prescribed as a consideration for the loan.

To constitute usury there must be an unlawful or corrupt intent proved. There must be reserved, either directly or indirectly,

as interest or compensation for giving time for payment, more than the legal rate. Woodruff *v.* Hurson, 32 *Barb.* 557. But where the principal sum is put in hazard, and there is a doubt or contingency as to its ultimate return, there is no loan upon which usury can arise. An additional compensation for the risk is permitted in such cases. Flight *v.* Chaplin, 2 *Barn. & Ad.* 112. But the contingency must be actual and *bona fide*, and not merely nominal. Colton *v.* Dunham, 2 *Paige*, 267.

In Bank of United States *v.* Waggener, *et al*, 9 *Peters*, 399, Justice STORY held that to constitute usury within the prohibitions of the law there must be shown an intention knowingly to contract for or take usurious interest. If neither party intend it, and act in good faith and innocently, a corrupt agreement will not be inferred. When, however, the contract imports usury on its face, there is no room for presumption. But when the writing calls for legal interest only, then it must be proved that there was some corrupt agreement, or device, or shift to cover usury,

and that it was in the full contemplation of the parties.

In Condit *v.* Baldwin, 21 *N. Y.* 219, the plaintiff placed in the hands of her agent and attorney, $400 to invest for her at lawful interest. Subsequently application was made to the attorney by Mills, on behalf of Baldwin, for a loan of the money on a note. The attorney said that he would prefer a mortgage, as he could then charge fees for examining title, &c. Mills then stated that the attorney should be compensated for his services. The loan was accordingly made, and the attorney gave Mills a check for $400, which was paid. Mills then handed Baldwin that amount, and in answer to the question of charges, Mills said they would be $40, which Baldwin paid to him. Baldwin did not know how this sum was disposed of by Mills, but it appeared that he paid the attorney $25, and kept $15 for himself. On this state of facts, the court, DAVIES, J., says: "In any view which we have taken of this case, we do not see that the $25 paid to Williams (the attorney) was for the benefit of the plaintiff, or that she had

any interest whatever in it." Judge COMSTOCK, in a very able dissenting opinion, held in substance, that the plaintiff could not sue upon the note, as such an act would be a ratification of the agent's authority. The contract of loan and usury was to be taken as one and inseparable. This opinion is clearly in accordance with the general principles regulating ratification, and is ably supported by that of Judge DAVIS, in Bell *v.* Day, 32 *N. Y.* 165, where Condit *v.* Baldwin is thoroughly discussed. While all the judges of the court of appeals, concurred in the reasoning of Judge DAVIS, a majority considered that, the question having been passed upon in the earlier case, it was not open to review. The rule, therefore, as laid down in these cases is this :

"Where the principal delivers money to his agent to be loaned, and the agent without authority from, or knowledge of, the principal, in loaning the money, charges, besides lawful interest, a bonus for himself, the loan is not thereby rendered usurious."

The question as to whether a loan made

under these circumstances is usurious or not, is determined by a reference to the transaction. If the bargain for additional compensation to the agent is distinct and divisible from the main contract, the latter may be enforced. Algur *v.* Gardner, 54 *N. Y.* 362.

APPENDIX.

I. OF THE INTEREST OF MONEY.

1 *Edm. Revised Statutes*, p. 725 (Title III. Ch. IV. Part 2, *Rev. St.*).

§ 1. The rate of interest upon the loan or forbearance of any money, goods, or things in action, shall continue to be seven dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time.

§ 2. No person or corporation shall, directly or indirectly, take or receive in money, goods, or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods, or things in action, than is above prescribed.

§ 3. Every person who, for any such loan

or forbearance, shall pay or deliver any greater sum or value than is above allowed to received, and his personal representatives, may recover in an action against the person who shall have taken or received the same, and his personal representatives, the amount of the money so paid or value delivered, above the rate aforesaid, if such action be brought within one year after such payment or delivery.

§ 4. If such suit be not brought within the said one year, and prosecuted with effect, then the said sum may be sued for and recovered with costs, at any time within three years after the said one year, by any overseer of the poor of the town where such payment may have been made, or by any county superintendent of the poor of the county, in which the payment may have been made.

§ 5. All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever (except bottomry and respondentia bonds and contracts), and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or

taken, or secured, or agreed to be reserved or taken, any greater sum or greater value, for the loan or forbearance of any money, goods, or things in action than is above prescribed, shall be void; but this act shall not affect such paper as has been made and transferred previous to the time it shall take effect.

§ 6. Every person offending against the provisions of this title, shall be compelled to answer on oath any bill that may be exhibited against him in the court of chancery, for the discovery of any sum of money, goods, or things in action so taken, accepted, or received, in violation of the foregoing provisions, or either of them.

§ 7. Every person who shall discover and repay or return the money, goods, or other things so taken, accepted, or received, or the value thereof, shall be acquitted and discharged from any other or further forfeiture, penalty, or punishment, which he may have incurred by taking or receiving the money, goods, or other things so discovered and repaid, or returned as aforesaid.

§ 8. Whenever any borrower of any

money, goods, or things in action, shall file a bill in chancery for a discovery of the money, goods, or things in action taken or received in violation of either of the foregoing provisions, it shall not be necessary for him to pay, or offer to pay, any interest whatever on the sum or thing loaned; nor shall any court of equity require or compel the payment or deposit of the principal sum, or any part thereof, as a condition of granting relief to the borrower in any case of a usurious loan forbidden by this chapter.

§ 9. For the purpose of calculating interest, a month shall be considered the twelfth part of a year, and as consisting of thirty days; and interest for any number of days less than a month shall be estimated by the proportion which such number of days shall bear to thirty.

§ 10. Whenever in any statute, act, deed, written or verbal contract, or in any public or private instrument whatever, any certain rate of interest is or shall be mentioned, and no period of time is stated for which such rate is to be calculated, interest shall be cal-

culated at the rate mentioned by the year, in the same manner as if the words "per annum," or "by the year" had been added to such rate.

II. AN ACT TO PREVENT USURY.

Passed May 15, 1837; *Laws*, 1837, Ch. 430.

§ 1. The fifth section of title three of chapter four, part two of the Revised Statutes, is hereby amended so as to read as follows:

"§ 5. All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever (except bottomry and respondentia bonds and contracts), and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value for the loan or forbearance of any money, goods, or other things in action, than is above prescribed, shall be void; but this act shall not affect such paper as has been made and transferred previous to the time it shall take effect."

§ 2. Whenever in an action at law the defendant shall plead or give notice of the defense of usury, and shall verify the truth of his plea or notice by affidavit, he may, for the purpose of proving the usury, call and examine the plaintiff as a witness, in the same manner as other witnesses may be called and examined.

§ 3. Every person offending against the provisions of the said title or of this act, may be compelled to answer on oath any bill that shall be exhibited against him in the court of chancery, for relief, or discovery, or both.

§ 4. Whenever any borrower of money, goods, or things in action, shall file a bill in chancery for relief or discovery, or both, against any violation of the provisions of the said title, or of this act, it shall not be necessary for him to pay or offer to pay any interest or principal on the sum or thing loaned; nor shall any court of chancery require or compel the payment or deposit of the principal sum or interest, or any portion thereof, as a condition of granting relief or compelling

or discovering to the borrower in any case, usurious loans forbidden by said title or by this act.

§ 5. Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, security, or any evidence of debt, has been taken or received in violation of the provisions of said title or of this act, the court of chancery shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and cancelled.

§ 6. Any person who shall directly or indirectly receive any greater interest, discount, or consideration than is prescribed in the said title, and in violation of the provisions of said title, or of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof the person so offending shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or both.

§ 7. It shall be the duty of all courts of justice to charge the grand jury especially to

inquire into any violations of the provisions of the said title or of this act.

§ 8. Every plaintiff examined as a witness pursuant to the provisions of this act, or any defendant under the provisions of this act, who shall swear falsely, shall upon conviction thereof suffer the pains and penalties of willful and corrupt perjury; but the testimony given by any plaintiff, or the answer of any defendant, made pursuant to the said title or of this act, shall not be used against such person before any grand jury, or on the trial of any indictment against such person.

§ 9. So much of title third, chapter fourth, and part second of the Revised Statutes as is inconsistent with the provisions of this act, is hereby repealed.

III. FORMS.

1. *Usual authority.*

NEW YORK, Jan. 1, 1876.

To JOHN DOE:

You are hereby authorized and employed to negotiate the sale of my property, No. street, upon the following terms: (stating them)

RICHARD ROE.

2. *Fuller form.*

NEW YORK, Jan. 1, 1876.

To JOHN DOE, Real Estate Broker:

You are hereby authorized and employed to negotiate the sale of my property (here describe property fully) upon the following terms amd conditions, viz: (here insert terms in full. $5,000 to be paid in cash

on delivery of the contract of sale, $5,000 on delivery of the deed, and $5,000 to remain upon bond and mortgage, at seven per cent. for five years). And I further authorize you to make, execute, and deliver a contract for the conveyance and assurance of said property, to the purchaser, upon the terms above set forth.

RICHARD ROE.

[If the authority be to execute a contract with covenants, the power must be sealed. See page 11.]

3. *Power to execute deed.*

KNOW ALL MEN by these presents that I, Richard Roe of , county of , and state of New York, have made, constituted and appointed, and do hereby make, constitute and appoint John Doe, of , county of , and state of New York, my true and lawful attorney for me and in my name, place, and stead, to * grant, bargain, and sell, all that certain lot (here insert a full description of the premises to be sold), for such price, and upon such terms and conditions as

he may deem meet; [or, upon the following terms and conditions, viz: (insert them;)] and for me, and in my name, to make, execute, acknowledge, and deliver to the purchaser of said property, good and sufficient deeds and conveyances for the same, with or without covenants, and warranty as my said attorney may elect;† giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal the day of , in the year one thousand eight hundred and seventy- .

RICHARD ROE. [seal]

Sealed and delivered in the presence of } JOHN BINNEY.

[This power should be acknowledged and recorded in the county where the property is situated. If recorded, any instrument revoking it, should also be recorded.]

4. *Acknowledgment of power.*

State of New York, } ss :
County of }

Be it known that on this day of , one thousand eight hundred and seventy- , before me personally came Richard Roe, to me known, and known to me to be the person described in and who executed the foregoing power of attorney, and he acknowledged that he executed the same for the uses and purposes therein mentioned.

Wm. O. Hughes,
Notary Public, New York county.

5. *Power to collect rents.*

[Follow Form 3 to the * and then insert the following :] to ask, demand, collect, and receive, all the rents which now are, or may

hereafter become due, or owing to me from Simon Styles, of as tenant or occupant of my certain house and premises, No. street, in the city of , and upon receipt thereof, to give proper receipts and acquittances therefor (add remainder of Form 3, after †).

[This power need not be recorded.]

6. *Power to manage lands.*

[Follow Form 3 to the * and then insert the following:] to enter into and upon all my lands, tenements, and hereditaments situated in the city of , and to exercise general control and supervision over the same; to prevent trespasses, waste, or any other injuries thereupon; and to sue for, recover, receive, and compound any damages which may result therefrom, under the advice of such counsel as my said attorney may select (Here add all of Form 3, after †).

[This power need not be recorded.]

7 .*Short lease* (p. 76).

This is to certify that Richard Roe, of , has let, and John Doe, of , has hired, the house and premises, No. street, in the city of , with the appurtenances, for the term of , to commence , 1876, and to end , 1876, at the rent of five cents for said term, to be paid at the expiration thereof. Upon the expiration of said term, said Doe shall quietly, and without notice, quit and surrender said premises in as good condition as of this day, reasonable use and wear thereof excepted.

Dated , 1876. RICHARD ROE.

Witness, JOHN BINNEY. JOHN DOE.

SUPREME COURT
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INDEX.

A.

Accounts, duty of broker as to, 23.
Action by broker, proof required in, 15–16, 46–47.
Agent, broker is, 1-4. (See BROKER.)
    Estopped when, 23–24.
    Relation of principal and, 4.
Attorney-in-fact, authority of, 11.
    When broker is, 11.
Auctioneer liable, when, 26.
Authority, assuming, effect of, 27–30.
    Apparent, 39–41.
    Brokers, form of, 5.
    Construction of, 6.
    Defined, 4.
    How followed, 6, 15, 26.
    Must be proved, 50.
    Nature of, governs, 3, 17.
    Need not precede act, 5, 12–14.
    Oral, 4–10.
    Of attorney-in-fact, 11.
    Ratification of, 5, 12–14, 22.
    Rights of broker, under, 3, 17.
    To execute contract of sale, 7.
    To close a bargain, 8.
    To contract, how exercised, 60, 66.

Authority—*Continued.*
To negotiate, 1–3, 5–6, 15–23, 47.
To sell, 6, 9–11, 47, 50, 52.
" at specified price, 47.
" within specified time, 50.
Usual limits of, 2, 6, 15, 25, 52.
Warranted, when, 27–30.
What implied in, 10, 41.
Written, when required, 10–11.

B.

Both parties, when broker may act for, 16–23.
Broker, accounts of, 23.
Act of, when void, 6.
" binds principal, 39.
Action by, proof required, 15–16, 46–47.
" against, 27, 86.
Appointment of, 4.
Attendance of, on negotiations, 15.
Attorney-in-fact, when, 11.
Authority of. (See AUTHORITY.)
Benefits secured by, 32–34.
Cannot become purchaser, 32–37.
Care required of, 31–32.
Commissions of. (See COMMISSIONS.)
Customer, proposed by, 47, 52, 55.
Defined, 1.
Disabilities of, 6, 32–37.
Discretion of, 17, 25.
Duty of. (See DUTY.)
Employment of. (See AUTHORITY.)

Broker—*Continued.*
Estoppel of, 23–24.
For both parties, 16–23.
Fraud of, 20, 31, 39, 40.
Interference of principal with, 53.
Liability of. (See LIABILITY.)
Misrepresentations by, 27, 39–40.
Notice to, 72.
Profits made by, 32, 34.
Relation of principal and, 4.
Rights of, 3, 17.
Who first sells, 54.
Brokerage. (See COMMISSIONS.)

C.

Commissions, ascertained, how, 42.
Defeated, how, 47, 50–54.
Earned, when, 46, 57.
Illegal, 42, 81–83.
On loans, 42–46.
On principal's failure, 51.
Construction of authority, 6.
Brokerage law, 44–46.
Recording act, 69–71.
Term "deed," 64–65.
" "land," 61.
Usury law, 78, 83.
Contract, acknowledgment of, 70, 71.
Advisability of recording, 74.
Alteration of, 67–68.
Assent to, 63.
Consideration of, 60.

Contract—*Continued.*
Deed, provision for, in, 64.
Delivery of, 66–67.
Description in, 61–63.
Of sale, requisites of, 58–59.
Parties to, 59.
" competency of, 59.
Description of, 60.
Record of. (See RECORD.)
Remedies under, 75–76.
Rights under, 75.
Seal on, 66.
Subscription to, 66.
Terms of, 63.
Written, when required, 7–10.
Customer, broker cannot be, 32–37
Requisites of, 47, 52, 55.

D.

Deed, authority to make, 11.
Construction of the word, 64–65.
Provision in contract for, 64.
Definition of—authority, 4.
Broker, 1.
Commissions, 42.
Conveyance, 69–70.
Notice, 73.
Ratification, 12.
Usury, 78.
Duty of Broker—employed to sell, 15, 47, 52, 50.
Employed to borrow, 15, 52.

Duty of Broker—*Continued.*
How regulated, 16, 17.
In serving principal, 6, 15, 32–38, 52.
To pay over moneys, 23.
To keep accounts, 23.

E.

Employment. (See AUTHORITY.)
Must be shown, 50.
Nature of, governs, 3, 17.
Usual, limits of, 2, 6, 15, 25, 52.

F.

Fraud of Broker, 20, 31, 39–40.
Form of—broker's authority, 5, 94.
Power to contract, 94.
" collect rents, 97.
" deed, 95.
" manage lands, 98.
" short lease, 98.

I.

Interest—computation of 88–89.
Rate of, 79, 85.
Statute of, 85.

L.

Land, what included in term, 61.
Liability of broker, 25–38.

Liability of Broker—*Continued.*
For assuming authority, 27.
exceeding authority, 26.
illegal brokerage, 42–46.
improper signature, 26.
moneys mis-paid, 30.
On void contract, 30–31.
To principal, 23, 31–38.
third parties, 25–31.
Of principal, 39.
vendor, 39, 75.
Lien of Vendor, 75.
Loans, brokerage on, 42–46.

M.

Misrepresentations by Broker, 27, 39-40.

N.

Negligence, rule of, after notice, 73–74.
Negotiations, attendance on, 15.
Notice, doctrine of, 69.
Effect of, 73.
Kinds of, 73.
Possession as, 72.

P.

Principal, authority given by. (See **Authority.**)
Commissions to be paid by, 44–57.
Description of, in contract, 59.

Principal—*Continued.*
Duty of broker to, 6, 15, 32--38.
Failure of, to fulfill, 51.
Fraud of broker, effect on, 40.
Interference of, 53.
Liabilities of, 39.
May withdraw, when, 66.
Moneys collected for, 23.
Notice to, 72.
Ratification by, 5, 12--14, 22.
Subscription of, 66.
Proof, required in action by broker, 15–16, 46-47.
Purchaser, broker cannot be, 32–37.
Delivery of contract to, 66.
Requisites of, 15, 47, 52, 55.
Rights of, 75.

R.

Ratification, requisites of, 5, 12-14, 22.
Record, acknowledgment for, 70, 71.
Effect of, 69.
Of contract, 69–74.
Advisability of, 74.
Rights of broker, ascertained, how, 3, 17.
Vendor, 75.

S.

Subscription, effect of broker's, 26.
Of principal, how made, 66.
Statute of—brokerage on loans, 42–44.

Statute of—*Continued.*
Frauds, 6–7.
Interest, 79, 85.
Usury, 78, 90.
Recording, 69–71.

T.

Time of reckoning interest, 88–89.

U.

Usury, by agent, 81.
Statute of, 85–93.
What constitutes, 79.

V.

Vendor, and purchaser, 75.
Liability of, 39, 75.
Lien of, 75.

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